REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 238 OF 2019

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 267 OF 2019

ERIC MUKAYAGI INDASI ..... 1ST APPELLANT

CYRIL MATASYO LIMISI ..... 2ND APPELLANT

VERSUS

REPUBLIC OF KENYA .....RESPONDENT

(Being appeals from the conviction and sentence in Kibera Chief Magistrate's Criminal Case No. 2420 of 2015 dated 24th September 2019 (Hon. J. Gandani (CM))

JUDGMENT

1. The two appellants herein were the 3rd and 4th accused in Kibera Criminal Case No. 2420 of 2015. They had been jointly charged with two others namely, *Charles Muchiri Kariuki* and *Teresia Waitherero Thogonjo* (1st and 2nd accused respectively) in two counts with the offences of being in possession of wildlife trophy and dealing in wildlife trophy contrary to *Section 95* and *Section 84 (1)* as read with *section 92* and *105* of the *Wildlife Conservation and Management Act of 2013*.

2. After a full trial, the 1st and 2nd accused were acquitted of both counts under *Section 215* of the *Criminal Procedure Code* for lack of sufficient evidence. The two appellants were convicted in both counts and were sentenced to serve 5 years imprisonment in count 1 and one year imprisonment in count 2. The sentences were ordered to run concurrently.

3. The appellants were dissatisfied with the trial court's decision. They separately lodged their appeals to the High Court challenging their conviction and resultant sentence.

The 1st appellant was the first to file his petition of appeal on 22nd November 2019 while the 2nd appellant filed his petition of appeal on 19th December 2019. As the appeals arose from the same judgment, they were consolidated and heard together.

4. In their respective appeals, the appellants challenged their conviction mainly on grounds that it was based on contradictory and unreliable evidence which was not sufficient to prove the charges preferred against them beyond any reasonable doubt. They also complained that the learned trial magistrate erred by relying on evidence of an identification parade which was conducted in contravention of the relevant provisions of the law. They also faulted the trial court for meting on them what in their view was a harsh and excessive sentence.

5. At the hearing, the appellants and the respondent chose to prosecute their appeals by way of written submissions which their counsel on record duly filed.

6. In their written submissions, the firm of *Ario & Company Advocates* for the 1st appellant and the firm of *Njiru Boniface & Company Advocates* for the 2nd appellant expounded on their grounds of appeal and urged the court to find that the appeals were merited and ought to be allowed.

7. On her part, learned prosecuting counsel *Ms Akunja* in her written submissions contested the appeals. She supported the appellants' conviction and sentence arguing that the convictions were proper as they were based on solid evidence which proved the offences charged in each count beyond any reasonable doubt. She also submitted that the sentence imposed on the appellants was reasonable and lawful. She

invited me to dismiss the consolidated appeals in their entirety for lack of merit.

8. This being the first appeal to this court, it is an appeal on both facts and the law. I am fully aware and guided by the principle regarding the duty of the first appellate court which is to revisit and evaluate afresh all the evidence presented before the trial court to draw my own independent conclusions remembering that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. See ***Okeno V Republic, [1972] EA 32; Soki V Republic, [2004] 2 KLR 21***.

9. I have carefully considered the grounds of appeal together with the written submissions filed on behalf of the appellants and the respondent and the authorities cited. I have also considered the evidence on record and the judgment of the trial court.

10. In my view, the key issue falling for my determination in the consolidated appeals is whether the prosecution adduced cogent and credible evidence which was sufficient to prove the guilt of the appellants in each count beyond any reasonable doubt and if the answer to this question is in the affirmative, whether the sentence imposed on the appellants was manifestly harsh or excessive.

11. As stated earlier, the appellants were charged in the first count with the offence of being in possession of wildlife trophy contrary to *section 95* as read with *section 105* of the *Wildlife Conservation* and *Management Act (*WCMA*)*.

The particulars thereof alleged that on 17th June 2015 at around 14:30 hours at Nairobi West Shopping Centre in Nairobi County, they were jointly found in possession of wildlife trophies namely worked elephant ivory pebbles weighing 40kgs with a street value of KShs.8,000,000 which was in two motor vehicles, namely, a Black Noah registration number KBH 859P and a Grey Toyota Premio registration number KAU 821C without a permit.

In the second count, it was alleged that on the same date, time and place, they were jointly found dealing with the worked elephant ivory pebbles in the two motor vehicles described in count 1.

12. I wish to start my analysis by observing that the inclusion of *Section 105* of WCMA in the statement of the charges in each count was unnecessary and irrelevant as the provision has nothing to do with the offences charged. *Section 105* as correctly noted by the learned trial magistrate only deals with forfeiture of the motor vehicle, equipment, appliance, livestock or any other thing in which the wildlife trophy in question was conveyed.

13. Section 95 of WCMA which creates the twin offences of being in possession or dealing with wildlife trophy without a permit provides that:

> **"Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine."**

14. From the above provision, it is clear that in order to prove the offence charged in count 1, the prosecution needed to establish beyond any reasonable doubt that the appellants were indeed found in possession of wildlife trophy in the form of elephant ivory pebbles without a permit issued under the Act or an exemption authorised under the Act.

15. Possession is defined in *Black's Law Dictionary 10th Edition* at page 1351 as follows:

> **"The fact of having or holding property in one's power; the exercise of dominion over property …. the right under which one may exercise control over something to the exclusion of all others…."**

16. This definition was adopted and applied by the court in ***Jean Wanjala Songoi & Patrick Manyola V Republic, HCRA No. 100 of 2014*** which was cited by the 2nd appellant in his submissions and was also referenced by the learned trial magistrate in her judgment. In that case, the court stated as follows:

> **"……. possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, that aspect of the offences was not established beyond reasonable doubt against the appellant."**

17. Given the above definition of possession, the question that now begs an answer is whether the prosecution proved beyond doubt before the trial court that the appellants were actually found in possession of the wildlife trophy as alleged. In order to answer this question, it is important to briefly revisit the case presented by the prosecution to the trial court.

18. The prosecution case as can be discerned from the evidence on record is that on 17th June 2015 at around 12:30pm, PW3 and PW4 received information that there were people offering for sale carved ivory at Nairobi West. The said people were in two motor vehicles, a Toyota Premio registration number KAU 821C (the Premio) and a black Noah registration number KBH 859P (the Noah) which were parked next to each other outside Barclays Bank. PW3 and PW4 recalled that on proceeding to the identified location, they found the two motor vehicles as described by their informer and as they were searching the Toyota Premio, two people alighted from the black Noah, locked its doors and fled.

19. According to PW3 and PW4, they arrested the occupants of the premio who were the 1st and 2nd accused and towed the Noah to Kenya

Wildlife Service Headquarters. Its doors were forced open with the help of PW7 *Sgt Stephen Kemboi,* a scene of crime officer. In the vehicle, they recovered ten packages ivory pebbles contained in a brown gunny bag (exhibit 5) and a Nakumatt paper bag (exhibit 6).

20. In their evidence, PW3 and PW4 who were the prosecution's star witnesses recalled that they were able to see the people who fled from the Noah and they were able to identify them as the appellants herein when they were arrested about nine months later.

21. In her judgement, the learned trial magistrate relied on PW3 and PW4's alleged identification of the appellants as the persons they saw fleeing from the Noah to make a finding that the appellants were found in possession of wildlife trophy in the form of ivory pebbles as confirmed by PW2. This formed the basis of the appellants' conviction in each count.

22. Though correctly relying on the authority of ***Wamunga V Republic (1989) KLR 424*** which emphasizes the need for a trial court to thoroughly scrutinize the evidence of identification or recognition of suspects to satisfy itself that the circumstances pertaining to the alleged identification were favourable and were free from the possibility of any error before making such evidence the basis for a conviction, the learned trial magistrate in this case did not seek to establish whether or not the circumstances in which the appellants were allegedly identified were conducive to a positive and correct identification of the culprits. This in my view was an error on the part of the learned trial magistrate.

23. After my own analysis, I find that the evidence on identification of the appellants as the persons who fled from the Noah in which the wildlife trophy was subsequently recovered was scanty and insufficient to form the basis of a safe conviction. For starters, PW3 and PW4 did not explain how they were able to see and identify the appellants in a way that enabled them to recognize them about nine months after the incident.

24. Granted that the incident occured during the day, it is in my view incredible, to say the least, that the witnesses could have seen and identified people who in their admission hurriedly fled the Noah when they were busy searching the Premio. In my opinion, it is clear from the evidence that the witnesses did not have sufficient time or the presence of mind to properly see and identify the persons who fled from the Noah. None of them pointed to any unique or special features of the appellants which they had seen on the material date which would have formed the basis of their identification as the culprits.

It is also apparent from the evidence on record that the appellants were not known to PW3 and PW4 prior to the material date. This was therefore a case of identification of strangers as opposed to a case of recognition which is always more reliable.

25. The evidence of identification of the appellants during the identification parade conducted by PW5 did not add any value to the prosecution's case considering that the parade was irregularly conducted five days after the appellants were arraigned in court which means that there was a very high likelihood that the appellants had been exposed to the identifying witness prior to the date the parade was conducted. The evidence relating to the identification parade was therefore worthless.

26. In view of the foregoing, I am satisfied that the learned trial magistrate erred by failing to carefully interrogate and consider the evidence on identification presented before her and thereby arrived at the erroneous conclusion that the appellants were positively identified as the persons who had possession of the vehicle in which the trophies were recovered.

27. I have noted that besides the direct evidence adduced by PW3 and PW4, the prosecution also relied on circumstantial evidence which also influenced the learned trial magistrate's decision to convict the appellants. The evidence took the form of a claim that the Noah belonged to the 2nd appellant's father and that the 1st appellant had admitted to the prosecution witnesses that a driving licence found in the said vehicle belonged to his brother.

28. It is important to note that though the 2nd appellant admitted that the vehicle was indeed owned by his father, he claimed in his defence that the vehicle was used for hire and denied that he was using it on the day in question. In any event, the mere fact that the vehicle belonged to his father is not by itself proof that the 2nd appellant was actually in possession of the vehicle at the time alleged.

The 1st appellant also denied in his defence that the driving licence recovered in the vehicle belonged to his brother. It is common knowledge that people who are not necessarily siblings can share similar names or surnames. The prosecution's claim that the driving licence recovered in the Noah belonged to the 1st appellant's brother and that it is the 1st appellant who was using it at the material time was not backed by any evidence.

29. It is trite that the burden of proof lies on the prosecution to prove the charges preferred against an accused person beyond any reasonable doubt. This duty does not shift to an accused person. An accused person does not have an obligation to prove his innocence.

30. Having found as I have that the appellants were not properly and positively identified as the persons who had possession of the vehicle in which the elephant trophies were recovered and considering that the offences charged in each count were pegged on the alleged possession of the said vehicle, I have come to the conclusion that the prosecution in this case failed to prove its case against the appellants beyond any reasonable doubt as required by the law. In my view, the appellants' conviction in each count was unsafe and cannot be sustained.

31. For the foregoing reasons, I find merit in the consolidated appeals and they are hereby allowed. The appellants' conviction in each count is hereby quashed and the resultant sentences set aside.

They shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2021

C. W. GITHUA

JUDGE

In the presence of:

Ms Ndombi for the respondent

Mr. Ario for the 1st appellants

Ms Muriuki for the 2nd appellant

Appellants present

Ms Karwitha: Court Assistant